



**DEPARTMENT OF LABOR**

**Employee Benefits Security Administration**

**[Prohibited Transaction Exemption 2022-04;Exemption**

**Application No. D-12048]**

**Exemption from Certain Prohibited Transaction Restrictions**

**Involving The Children's Hospital of Philadelphia Pension**

**Plan for Union-Represented Employees**

**Located in Philadelphia, PA**

**AGENCY:** Employee Benefits Security Administration, Labor.

**ACTION:** Notice of exemption.

**SUMMARY:** This document contains a notice of exemption issued by the Department of Labor (the Department) from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (ERISA or the Act) and/or the Internal Revenue Code of 1986 (the Code). This exemption permits the sale (the Sale) of certain illiquid private fund interests (the Interests) by the Children's Hospital of Philadelphia Pension Plan for Union-Represented Employees (the Plan or the Applicant) to the Children's Hospital of Philadelphia Foundation (the Foundation).

**FOR FURTHER INFORMATION CONTACT:** Mr. Joseph Brennan of the Department at (202) 693-8456. (This is not a toll-free number.)

**SUPPLEMENTARY INFORMATION:** The Applicant requested an

individual exemption pursuant to ERISA section 408(a) in accordance with the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637, 66644, October 27, 2011). On March 9, 2022, the Department published a notice of proposed exemption in the Federal Register that would permit the Sale of the Interests by the Plan to the Foundation, provided certain conditions are met.<sup>1</sup>

After considering the entire record developed in connection with the Applicant's exemption application, including two comment letters discussed below, the Department has determined to grant the exemption subject to the new definitions section and the conditions described below. The exemption only provides the relief specified in the exemption text and does not provide relief from violations of any law other than the prohibited transaction provisions of ERISA expressly stated herein.

The Department makes the requisite findings under ERISA section 408(a) that the exemption is: (1) administratively feasible, (2) in the interest of the plan and its participants and beneficiaries, and (3) protective of the rights of the Plan's participants and beneficiaries, if all of the exemption conditions are met. Accordingly, affected parties should be aware that the conditions incorporated in this exemption are, individually and taken as a whole, necessary for the Department to grant the

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<sup>1</sup> 87 FR 13324, March 9, 2022.

relief requested by the Applicant. Absent these or similar conditions, the Department would not have granted this exemption.

### **BACKGROUND**

As discussed in further detail in the proposed exemption, the Plan owns 23 private fund limited partnership interests and one illiquid "side pocket" portion of an original hedge fund investment (the Interests). The Interests include investments in private equity funds, real estate funds, and natural resource funds. The Applicant represents that the Plan originally invested in the Interests because each Interest provided significant risk adjusted rate of return potential and appropriate investment diversification. As of October 1, 2021, the Interests represented approximately 8.5% of the Plan's assets, with fair market values ranging from \$0 to \$990,321.

The Plan intends to improve Plan liquidity and diversification by selling the Interests. As confirmed by Newport Trust Company (Newport), the independent fiduciary engaged to represent the Plan, sales of the Interests to an unrelated third party on the open market would likely be for less than book value. According to Newport, such sales for the Interests' fair market value would require approval from the respective general partner of each Interest and would likely result in the plan receiving approximately 15

percent less than the cash equivalent of book value.

Rather than sell the Interests for less than book value, the Applicant requested an exemption to permit the Plan to sell the Interests at full book value to the Foundation, a party in interest with respect to the Plan.<sup>2</sup> An exemption is necessary because the Sale is prohibited under ERISA and the Code.

On March 9, 2022, the Department proposed an exemption that would permit the Plan to sell the Interests to the Foundation. The exemption requires a prudently appointed and qualified independent fiduciary, Newport, to protect and promote the interests of Plan participants and beneficiaries in the transaction. The exemption also contains protective conditions, including a requirement that Newport represent the Plan's interests for all purposes with respect to the Sale, and a requirement that the Plan not pay any commissions, fees, or other expenses associated with the Sale.

The Department finds that the favorable terms of the Sale together with the protective conditions included herein are appropriately protective of, and in the interest of the Plan and its participants and beneficiaries.

#### **WRITTEN COMMENTS RECEIVED**

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<sup>2</sup> The Foundation's relationship to the Plan Sponsor is that the Foundation supports the operations and funding of the Plan Sponsor, but the two entities do not have any ownership interests in each other.

In the proposed exemption, the Department invited all interested persons to submit written comments and/or requests for a public hearing with respect to the notice of proposed exemption.

The Department received one comment letter from Newport and another from the Applicant. The Department did not receive any requests for a public hearing. Presented below is a discussion of both comment letters.

#### **Comments from Newport**

Section II (c) of the proposed exemption states that: "The Sale price for each Interest will be the fair market value of the Interest as of the date of the Sale, as determined by the Independent Fiduciary, based upon an updated Independent Appraisal Report prepared by the Independent Appraiser that values the Interest as of the date of the Sale."

In its comment letter, Newport states that it evaluated the Sale of the Interests by the Plan to the Foundation based upon the assumption that the Plan would receive the greater of: (1) the fair market value of each Interest as of the date of the Sale, as determined by Newport, based upon a qualified independent appraisal by SB Advisors LLC (SB Advisors); or (2) the book value of each Interest, as determined by the general partner of each Interest (less any distributions and plus any contributions made between the valuation date and the Sale). Newport

states that the book value of the Interests exceeded their fair market value by \$2,114,073 based on the valuation report prepared by SB Advisors dated May 24, 2021. Newport represents that it referred to this favorable pricing, among other factors, when it concluded that the terms and conditions of the Sale were favorable to the Plan and its participants.

Newport recommends that the Department add an exemption condition that would require CHOP to make a voluntary cash contribution to the Plan in the amount equal to the difference (if any) between: (1) the book value of each of the Interests as determined by the general partner of each Interest as reflected on the most recent valuation statement of the Interest immediately before the Sale (less any distributions and plus any contributions made between the valuation date and the sale), and (2) the fair market value of each Interest as of the date of the Sale as determined by Newport based upon a qualified independent appraisal by SB Advisors.

**Department's Response:** The Department agrees with Newport's recommendation that the Plan receives the greater of fair market value or full book value for the Interests. However, the Department has determined that the Sale of the Interests must be for the greater of book value or fair market value rather than fair market value plus a subsequent cash contribution. Therefore, the Department

has amended section II(c) to state, "The Sale price for each Interest will equal the greater of: (1) the fair market value of each Interest as of the date of the Sale, as determined by Newport, based upon a qualified independent appraisal by SB Advisors LLC (SB Advisors); or (2) the book value of each Interest, as determined by the general partner of each Interest as reflected on the most recent valuation statement of the Interest immediately before the Sale (less any distributions made from the Interest to the Plan and plus any contributions made by the Plan to the Interests between the valuation date and the Sale)."

**Comments from the Applicant**

In its comment letter, the Applicant requests the Department to incorporate the following factual corrections into the exemption: (1) the full name of the Committee is "The Pension Fiduciary Committee of the Children's Hospital of Philadelphia;" (2) as of April 29, 2022, the duration of the Plan's investment in the Interests is 11-17 years, rather than 7-18 years as stated in the proposed exemption; and (3) the Foundation's relationship to the Plan Sponsor is that the Foundation supports the operations and funding of the Plan Sponsor, but the two entities are not connected on the basis of ownership (and more specifically, the Foundation does not own the Plan Sponsor).

**Department's Response:** The Department acknowledges and accepts the Applicant's factual corrections to the proposed exemption.

The complete application file (D-12048) for this exemption is available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, Room N-1515, U.S. Department of Labor, 200 Constitution Avenue N.W., Washington, D.C. 20210. For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, please refer to the notice of proposed exemption published on March 9, 2022, at 87 FR 13324.

#### **GENERAL INFORMATION**

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under ERISA section 408(a) does not relieve a fiduciary or other party in interest from certain requirements of other ERISA provisions, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of ERISA section 404, which, among other things, require a fiduciary to discharge their duties respecting the plan prudently and solely in the interest of the plan's



participants and beneficiaries.

(2) As required by ERISA section 408(a), the Department hereby finds that the exemption is: (a) administratively feasible; (b) in the interests of the affected plan and its participants and beneficiaries; and (c) protective of the rights of the plan's participants and beneficiaries.

(3) This exemption is supplemental to, and not in derogation of, any other ERISA provisions, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of determining whether the transaction is in fact a prohibited transaction.

(4) The availability of this exemption is subject to the express condition that the material facts and representations contained in the application accurately describe all material terms of the transactions that are the subject of the exemption.

Accordingly, the Department grants the following exemption under the authority of ERISA section 408(a) and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637, 66644, October 27, 2011):

#### **EXEMPTION**

#### **SECTION I. DEFINITIONS**

(a) "CHOP" means The Children's Hospital of Philadelphia, the Plan sponsor of the Children's Hospital of Philadelphia Pension Plan for Union-Represented Employees.

(b) "The Foundation" means the Children's Hospital of Philadelphia Foundation.

(c) The term "Independent Appraiser" means an individual or entity meeting the definition of a "Qualified Independent Appraiser" under Department Regulation 29 CFR 2570.31(i) retained to determine, on behalf of the Plan, the fair market value of the Interests as of the date of the Sale and who:

(1) Is not CHOP or the Foundation or an affiliate of CHOP or the Foundation and does not hold an ownership interest in CHOP, the Foundation or affiliates of CHOP or the Foundation;

(2) Is independent of and is not related to any party to the exemption transaction, including CHOP, the Foundation, and the Independent Fiduciary, as defined below;

(3) Has acknowledged in writing that it has appropriate technical training or experience to perform the services contemplated by the exemption;

(4) Has not entered into any agreement or instrument that violates the prohibitions on exculpatory provisions in ERISA section 410 or the Department's regulation relating to indemnification of fiduciaries at 29 CFR 2509.75-4;

(5) For purposes of this definition, no organization or individual may serve as Independent Appraiser for any fiscal year if the gross income received by such organization or individual from CHOP, the Foundation, and affiliates of CHOP and the Foundation for that fiscal year exceeds two percent of such organization's or individual's gross income from all sources for the prior fiscal year. This provision also applies to a partnership or corporation of which such organization or individual is an officer, director, or 10 percent or more partner or shareholder and includes as gross income amounts received as compensation for services provided as an independent fiduciary under any prohibited transaction exemption granted by the Department;

(6) No organization or individual that is an Independent Appraiser and no partnership or corporation of which such organization or individual is an officer, director, or ten percent or more partner or shareholder may acquire any property from, sell any property to, or borrow any funds from CHOP, the Foundation, or affiliates of CHOP or the Foundation while the individual serves as an Independent Appraiser. This prohibition would continue for a period of six months after the party ceases to be an Independent Appraiser; and

(7) In the event a successor Independent Appraiser is appointed to represent the interests of the Plan with

respect to the subject transactions, no time should elapse between the resignation or termination of the former Independent Appraiser and the appointment of the successor Independent Appraiser;

(d) The term "Independent Fiduciary" means a person who:

(1) Is not CHOP or the Foundation or an affiliate of CHOP or the Foundation and does not hold an ownership interest in CHOP, the Foundation or affiliates of CHOP or the Foundation;

(2) Was not a fiduciary with respect to the Plan before its appointment to serve as the Independent Fiduciary;

(3) Has acknowledged in writing that:

(i) It is a fiduciary and has agreed not to participate in any decision with respect to any transaction in which it has an interest that might affect its best judgment as a fiduciary; and

(ii) Has appropriate technical training or experience to perform the services contemplated by the exemption;

(4) Has not entered into any agreement or instrument that violates the prohibitions on exculpatory provisions in ERISA section 410 or the Department's regulation relating to indemnification of fiduciaries at 29 CFR 2509.75-4;

(5) For purposes of this definition, no organization or individual may serve as Independent Fiduciary for any fiscal year if the gross income received by such organization or individual from CHOP, the Foundation, and affiliates of CHOP and the Foundation for that fiscal year exceeds two percent of such organization's or individual's gross income from all sources for the prior fiscal year. This provision also applies to a partnership or corporation of which such organization or individual is an officer, director, or 10 percent or more partner or shareholder and includes as gross income amounts received as compensation for services provided as an independent fiduciary under any prohibited transaction exemption granted by the Department;

(6) No organization or individual that is an Independent Fiduciary and no partnership or corporation of which such organization or individual is an officer, director or ten percent or more partner or shareholder may acquire or commit to acquire any property from, sell or commit to sell any property to, borrow or commit to borrow any funds from, or lend or commit to lend any assets to CHOP, the Foundation, or affiliates of CHOP or the Foundation while the individual serves as an Independent Fiduciary. This prohibition would continue for a period of six months after either: (i) the party ceases to be an Independent Fiduciary, or (ii) the Independent Fiduciary

negotiates on behalf of the Plan during the period that such organization or the individual serves as an Independent Fiduciary; and

(7) In the event a successor Independent Fiduciary is appointed to represent the interests of the Plan with respect to the subject transactions, no time should elapse between the resignation or termination of the former Independent Fiduciary and the appointment of the successor Independent Fiduciary;

(e) The term "Interests" means certain private fund limited partnership interests and one illiquid side pocket portion of an original hedge fund investment to be sold by the Children's Hospital of Philadelphia Pension Plan for Union-Represented Employees to the Foundation. The Interests consist of 18 funds that are spread among 14 managers and have varying durations. The Plan's investment duration in the Interests ranges from 11-17 years.

(f) The term "Plan" means the Children's Hospital of Philadelphia Pension Plan for Union-Represented Employees.

## **SECTION II. COVERED TRANSACTIONS**

The restrictions of ERISA sections 406(a)(1)(A) and (D), and 406(b)(1) and (b)(2), and the sanctions resulting from the application of Code section 4975, by reason of Code sections 4975(c)(1)(A), (D) and (E) shall not apply to the sale (the Sale) of certain illiquid private fund interests

(the Interest(s)) by the Children's Hospital of Philadelphia Pension Plan for Union-Represented Employees (the Plan or the Applicant) to the Children's Hospital of Philadelphia Foundation (the Foundation) where the Sale price for each Interest is the greater of: (1) the fair market value of each Interest as of the date of the Sale, as determined by Newport Trust Company (Newport), based upon a qualified independent appraisal by SB Advisors LLC (SB Advisors); or (2) the book value of each Interest, as determined by the general partner of each Interest as reflected on the most recent valuation statement of the Interest immediately before the Sale (less any distributions made from the Interest to the Plan and plus any contributions made by the Plan to the Interest between the valuation date and the Sale). In order to receive such relief, the Conditions in Section III must be met in conformance with the Definitions set forth in Section I.

### **SECTION III. CONDITIONS**

(a) The Sale of each Interest is a one-time transaction for cash;

(b) The terms and conditions of the Sale are at least as favorable to the Plan as those the Plan could obtain in an arm's-length transaction with an unrelated third party;

(c) The Sale price for each Interest will equal the greater of: (1) the fair market value of each Interest as of

the date of the Sale, as determined by Newport, based upon a qualified independent appraisal by SB Advisors; or (2) the book value of each Interest, as determined by the general partner of each Interest as reflected on the most recent valuation statement of the Interest immediately before the Sale (less any distributions made from the Interest to the Plan and plus any contributions made by the Plan to the Interest between the valuation date and the Sale).

(d) The Foundation assumes any remaining capital commitments in connection with the Interests;

(e) The Plan pays no commissions, fees, or other expenses in connection with the Sale;

(f) The Independent Fiduciary:

(1) Represents the Plan's interests for all purposes with respect to the Sale;

(2) Determines that the Sale is in the interests of, and protective of, the Plan and its participants and beneficiaries;

(3) Determines that the Sale price for the Interests is protective of and in the interests of the Plan;

(4) Reviews and approves the terms and conditions of the Sale;

(5) Independently and prudently engages the Independent Appraiser for the Sale;

(6) Reviews the Independent Appraisal Report, confirms that the underlying methodology is reasonable and



accurate and that the Independent Appraiser has reasonably determined the fair market valuation of the Interests in accordance with professional standards;

(7) Ensures that the Independent Appraiser renders an updated fair market valuation of the Interests as of the date of the Sale that includes a separate assessment regarding the likelihood that any Interest reported as having no value in the appraisal report may receive trailing distributions. The Independent Appraiser must consider this likelihood when valuing any Interest and address the extent to which this likelihood affects the Interest's value in its report;

(8) Determines whether it is prudent for the Plan to proceed with the Sale;

(9) Has not and will not enter into any agreement or instrument that violates ERISA Section 410;<sup>3</sup>

(10) Confirms that each condition of the exemption has been met; and

(11) Submits a written report to the Department not later than 90 days after the Sale has been completed demonstrating that each exemption condition has been met. The written report must include the Independent Fiduciary's determinations regarding whether any Interest is likely to receive trailing distributions and the extent to which any

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<sup>3</sup> ERISA section 410 generally provides that any provision in an agreement or instrument that purports to relieve a fiduciary for responsibility or liability for any responsibility, obligation, or duty under Part I of Title I of ERISA is void against public policy.

anticipated trailing distributions increased the Interest's value.

(g) The Plan does not bear the costs of: (1) the exemption application; (2) obtaining the exemption; nor (3) the Independent Fiduciary or Independent Appraiser's fees;

(h) The Foundation receives written consent from each Fund manager to purchase the Interests from the Plan before engaging in the Sale of the respective Interests;

(i) The Sale is not part of an agreement, arrangement, or understanding designed to benefit CHOP or the Foundation; and

(j) All the material facts and representations set forth in the Summary of Facts and Representations are true and accurate at all times.

EFFECTIVE DATE: This exemption will become effective on the date that this grant notice is published in the Federal Register.

Signed at Washington, DC.

**George Christopher Cosby,**  
*Director, Office of Exemption Determinations,  
Employee Benefits Security Administration,  
U.S. Department of Labor.*